SUPREME COURT OF MISSOURI
en banc

CAUSE NO. SC92116

TERRY HORNBECK,

Appellant/Cross-Respondent,

vs.

SPECTRA PAINTING, INC.,

Respondent/Cross- Appellant

and

TREASURER OF THE STATE OF MISSOURI SECOND INJURY FUND,
AS CUSTODIAN OF THE SECOND INJURY FUND,

Respondent.

On Appeal from the Labor and Industrial Relations Commission of Missouri
Injury No. 06-124920

APPELLANT/CROSS-RESPONDENT'S SUBSTITUTE REPLY AND CROSS APPEAL BRIEF

Respectfully Submitted:

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C. THE COMMISSION EXCEEDED ITS POWER IN REQUIRING CLAIMANT TO DEPOSE HIS SELECTED MEDICAL PROVIDERS TO SATISFY HIS BURDEN TO PROVE THE CAUSE FOR HIS TREATMENT AFTER APRIL 2007;

D. THE COMMISSION'S RELIANCE ON THE TESTIMONY OF EMPLOYER'S MEDICAL EXPERTS TO CONCLUDE CLAIMANT REACHED MMI IN APRIL 2007 IS NOT SUPPORTED BY THE RECORD BECAUSE THEIR OPINIONS WERE BASED UPON INCOMPLETE INFORMATION AND NONE OF THE EXPERTS EXAMINED CLAIMANT, TOOK AN ADDITIONAL HISTORY OR REVIEWED HIS ADDITIONAL TREATMENT RECORDS AFTER RELEASING CLAIMANT AND DECLARING HIM TO BE AT MMI;

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APPELLANT'S REPLY BRIEF

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I. THE COMMISSION ERRED IN ENTERING A FINAL PPD AWARD BECAUSE THE COMMISSION EXCEEDED ITS POWER WHEN IT MISAPPLIED THE LAW AND ITS FINDINGS THAT CLAIMANT REACHED MMI IN APRIL 2007 AND FAILED TO PROVE THAT HIS SUBSEQUENT TREATMENT AND INABILITY TO WORK WAS CAUSALLY RELATED TO HIS COMPENSABLE WORK ACCIDENT ARE NOT SUPPORTED BY THE RECORD AND ARE CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE, AS REVIEWABLE UNDER §287.495.1, IN THAT:

A. THE COMMISSION EXCEEDED ITS POWER WHEN IT MISAPPLIED THE LAW IN REQUIRING CLAIMANT TO PROVE THAT HIS COMPENSABLE WORK ACCIDENT WAS THE PREVAILING FACTOR IN CAUSING HIS MEDICAL CONDITION AND DISABILITY FOR WHICH TREATMENT WAS REASONABLY REQUIRED AFTER APRIL 2007;

B. THE COMMISSION EXCEEDED ITS POWER IN FAILING TO CONSIDER CLAIMANT'S UNCONTRADICTED AND UNIMPEACHED TESTIMONY AND HIS MEDICAL RECORDS WHICH PROVIDED SUBSTANTIAL COMPETENT EVIDENCE THAT HIS MEDICAL TREATMENT AFTER APRIL 2007 FLOWED

FROM HIS COMPENSABLE WORK ACCIDENT UNDER §287.140.1 RSMO.;

C. THE COMMISSION EXCEEDED ITS POWER IN REQUIRING CLAIMANT TO DEPOSE HIS SELECTED MEDICAL PROVIDERS TO SATISFY HIS BURDEN TO PROVE THE CAUSE FOR HIS TREATMENT AFTER APRIL 2007;

D. THE COMMISSION'S RELIANCE ON THE TESTIMONY OF EMPLOYER'S MEDICAL EXPERTS TO CONCLUDE CLAIMANT REACHED MMI IN APRIL 2007 IS NOT SUPPORTED BY THE RECORD BECAUSE THEIR OPINIONS WERE BASED UPON INCOMPLETE INFORMATION AND NONE OF THE EXPERTS EXAMINED CLAIMANT, TOOK AN ADDITIONAL HISTORY OR REVIEWED HIS ADDITIONAL TREATMENT RECORDS AFTER RELEASING CLAIMANT AND DECLARING HIM TO BE AT MMI;

E. THE COMMISSION EXCEEDED ITS POWER IN REJECTING THE UNCONTRADICTED MEDICAL CAUSATION OPINIONS OF DR. VOLARICH THAT CLAIMANT WAS NOT AT MMI IN APRIL 2007 AND HIS SUBSEQUENT TREATMENT WAS REASONABLE AND NECESSARY TO HELP ALLEVIATE THE EFFECTS OF HIS WORK-RELATED INJURIES;

F. CLAIMANT IS ENTITLED TO TTD BENEFITS AND INTEREST SINCE THE UNCONTRADICTED EVIDENCE ESTABLISHED HIS

INABILITY TO WORK AFTER APRIL 2007 FLOWED FROM HIS COMPENSABLE WORK ACCIDENT;

G. CLAIMANT IS ENTITLED TO RECOVER HIS ATTORNEY'S FEES AND COSTS SINCE EMPLOYER DENIED HIM ADDITIONAL BENEFITS WITHOUT REASONABLE CAUSE; AND

H. THE PPD AWARDS ARE NOT SUPPORTED BY THE RECORD SINCE THEY FAIL TO TAKE INTO ACCOUNT CLAIMANT'S ADDITIONAL TREATMENT AND DISABILITIES.

1. The Commission misapplied the law in denying Claimant temporary total disability and medical benefits beyond April 2007 because it held Claimant to a heightened standard of proof not required under the Missouri Workers' Compensation Act.

Section 287.140.1 guarantees an injured worker the right to medical treatment reasonably necessary to cure and relieve the effects of a compensable injury. To prevail on a claim for additional necessary treatment, a claimant need only prove that the treatment flowed from the compensable work injury. ***Tillotson v. St. Joseph Medical Center***, 347 S.W.3d 511 (Mo.App. W.D. 2011).

Employer does not assert that Claimant was required to prove his work accident was the prevailing factor in requiring additional medical treatment after April 2007. Instead, Employer argues Claimant's reliance on ***Tillotson*** is misplaced because unlike the facts here, in ***Tillotson***, there was an agreement between the parties that the employee required

additional treatment (knee replacement surgery) to cure the work injury. Employer's argument is flawed in at least two ways. First, in ***Tillotson***, the medical experts disagreed on the cause for the knee replacement surgery. As in the present case, in ***Tillotson***, the Commission specifically accepted the testimony of the employer's expert over that of the claimant's expert regarding whether the work accident was the prevailing factor in causing the need for additional treatment. Second, regardless of the differences between ***Tillotson*** and the present case, in both cases the Commission erroneously declared and applied the law in requiring the claimant to prove that the work accident was the prevailing factor for the need for additional medical treatment.

Whether the opinions of Employer's experts are supported by competent and substantial evidence is a separate issue that only effects the scope of relief, i.e., should the Court remand with directions to enter a temporary award? *See* ***Tillotson, Id.*** Because the Commission's ultimate conclusion that Claimant reached MMI in April 2007 is based on a misapplication of the law, minimally, the conclusion must be reversed and the claim remanded to the Commission to reconsider the evidence using the correct legal standard. *See* ***Van Winkle v. Lewellens Professional Cleaning, Inc.***, 258 S.W.3d 889, 898 (Mo.App. W.D. 2008). Section 287.495.1 RSMo. (2002).

2. Claimant Met His Burden of Proof on the Issue of Causation.

In his initial brief, Claimant summarized the record demonstrating how the Commission's majority erred in concluding that Claimant failed to meet his burden of proof on the issue of causation. Claimant advanced two arguments. He argued, first, this is not the

type of case that required expert medical testimony to prove the cause for Claimant's additional medical treatment and, as a matter of law, the Commission erred in ignoring Claimant's testimony and the medical records that provided uncontradicted substantial competent evidence that the November 2006 accident was the prevailing factor in causing his need for additional medical treatment and the continuation of TTD benefits beyond April 27, 2007 when Employer terminated disability benefits owed under §287.170 RSMo. [Appellant's Substitute Brief, pp. 50-54]. Employer fails to respond to this argument altogether.

In the alternative, second, assuming Claimant needed to produce medical testimony to prove his work accident caused his medical condition that warranted treatment after April 2007, Dr. Volarich provided the necessary testimony [Appellant's Substitute Brief, pp. 55-70]. Employer responds that because the Commission found its medical experts more credible than Dr. Volarich, the Court must give deference to the Commission's ultimate finding that Claimant reached maximum medical improvement in April 2007. Employer is mistaken. The Commission's ability to credit and discredit testimony has never been unlimited and if the findings of the Commission are not supported by competent substantial evidence, the reviewing court must reverse. ***Hampton v. Big Boy Steel Erection***, 121 S.W.3d 220 (Mo.banc 2003).

Deference to the credibility findings of the Commission does not mean the reviewing court cannot perform its own proper function of reaching its own conclusions in accord with the teachings of ***Hampton***. To give the principle of due deference, the meaning suggested

by Employer would render all substantial evidence reviews futile and an unnecessary expense. ***Douglas v. St. Joseph Lead Co.***, 231 S.W.2d 258, 263 (Mo.App. 1950).

Although it is the function of an agency, in a contested case, to determine the credibility of witnesses, it does not have unlimited latitude to chose to believe one side over another. ***Barnes Hosp. v. Missouri Com'n on Human Rights***, 661 S.W.2d 534, 537 (Mo.banc. 1983). The reviewing court may determine that the agency's credibility findings on witnesses who gave oral testimony before the agency are not supported by substantial evidence and reverse the agency's decision when it is contrary to and not supported by the evidence. ***Id.*** at 537-38.

Moreover, it has been long established in Missouri that the due deference rule has no application to the Commission's findings involving the credibility of witnesses who testify by deposition. In ***Hampton***, the Court cited ***Wood v. Wagner Elec. Corp.***, 355 Mo. 670, 197 S.W.2d 647 (Mo.banc. 1946) in support of the substantial evidence standard of review. ***Id.*** 121 S.W.3d at 222-23. The ***Hampton*** court then proceeded to review the entire record to determine whether the Commission's credibility findings were supported by competent and substantial evidence. In ***Wood***, the Supreme Court noted that when reviewing a workers' compensation case, deference is to be given "to findings, involving credibility of witnesses, made by those before whom the witnesses gave oral testimony." ***Id.*** at 674. The Commission's findings involving the credibility of deposition testimony of witnesses, however, are not due any deference. This is because the court has "the same opportunity to decide the effect of this evidence as the Commission had, since it only had before it the same

written transcript that is before" the court. ***Id.*** at 679. Since the ***Hampton*** decision, the courts of appeals have overlooked the holding in ***Wood***.

Since ***Hampton***, in cases turning on the Commission's acceptance or rejection of expert deposition testimony, the courts of appeals have frequently cited ***Alexander v. D.L. Sitton Motor Lines***, 851 S.W.2d 525 (Mo.banc. 1993), which describes the court's standard of review as follows:

> [U]nder Article V, §18, of the Missouri Constitution we review the decision of the Commission to see that it is supported by competent and substantial evidence on the record as a whole. In that review, we defer to the Commission on issues involving the credibility of witnesses and the weight to be given testimony, and we acknowledge that the Commission may decide a case 'upon its disbelief of uncontradicted and unimpeached testimony.' ***Ricks v. H. K. Porter, Inc.***, 439 S.W.2d 164 (Mo. 1969). Questions of law, of course, are the proper subject of our review. Section 287.495.1 RSMo. (1986). ***Id.*** at 527.

In such cases, the courts of appeals have mistakenly suggested that the ***Alexander*** deference rule applies to the Commission's findings involving credibility of the deposition testimony of witnesses. ***Wood***, *supra*.

In one line of cases, the Western District, after acknowledging the ***Alexander*** rule, correctly proceeded to review the record to determine whether the Commission's credibility findings on competing or unrefuted medical opinions were supported by competent and substantial evidence as required under ***Hampton***. *See e.g.*, ***Kliethermes v. ABB Power T &***

D, 264 S.W.3d 626 (Mo.App. W.D. 2008); ***Daly v. Powell Distributing, Inc.***, 328 S.W.3d 254 (Mo.App. W.D. 2010); and ***Angus v. Second Injury Fund***, 328 S.W.3d 294 (Mo.App. W.D. 2010). *Compare*, ***Townser v. First Data Corp.***, 215 S.W.3d 237 (Mo.App. E.D. 2007) (where the court distinguished the holding in ***Aldridge v. South Missouri Gas Co.***, 131 S.W.3d 876 (Mo.App. S.D. 2004), stating that deference must be afforded to the Commission on issues of credibility and weight to be given conflicting evidence and proceeded to reverse the Commission's decision because it was not supported by substantial evidence. ***Id.*** at 244).

In another line of cases, the Southern and Eastern Districts have mistakenly analyzed the Commission's expert deposition testimony credibility findings under either the ***Alexander*** rule or the Supreme Court's holding in ***Corp v. Joplin Cement Co.***, that if the evidence is uncontradicted or unimpeached, "the reviewing court may find the award was not based upon disbelief of the testimony of the witnesses." 337 S.W.2d 252, 258 (Mo.banc. 1960). ***Houston v. Roadway Express, Inc.***, 133 S.W.3d 173, 179-80 (Mo.App. S.D. 2004) and ***Highley v. Von Weise Gear***, 247 S.W.3d 52, 56-7 (Mo.App. E.D. 2008). In ***Houston*** and ***Highley***, the courts of appeals reconciled the holdings in ***Alexander*** and ***Corp*** as follows:

> If the Commission expressly declares that it disbelieves uncontradicted or unimpeached testimony, or if reference to the award shows that the Commissioner's belief of the employee or his doctor was the basis of the award, then the ***Alexander*** rule attends. On the other hand, the ***Corp*** rule attends where the record is wholly silent concerning the Commission's weighing of credibility.

Houston, ***Id.*** at 179 and ***Highley***, ***Id.*** at 56-57. *See also* ***Copeland v. Thurman Stout, Inc.***, 204 S.W.3d 737, 743-44 (Mo.App. S.D. 2006); ***Richardson v. Missouri State Treasury***, 254 S.W.3d 242, 244-45 (Mo.App. E.D. 2008); and ***Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund***, 272 S.W.3d 267, 273-75 (Mo.App. E.D. 2008).

In ***Highley***, *supra*, the Eastern District reversed the Commission and remanded with directions to award the claimant permanent and total disability benefits against the Fund. The court concluded that the Commission did not make a credibility determination, but merely pointed out "flaws" in the unrefuted testimony of the two expert witnesses who testified that claimant was unemployable in the open labor market. 247 S.W.3d at 58. Furthermore, the Court found that the flaws identified by the Commission in the testimony of the two experts were not supported by the record. ***Id.*** As a result, it applied the rule in ***Corp***, reversing the award and holding that the Commission could not arbitrarily disregard or ignore competent and substantial and undisputed evidence of witnesses who have not been impeached. ***Id.***

The facts in ***Highley*** compare favorably to those in the present case. Here, the Commission found the testimony of Employer's experts to be more credible than that of Dr. Volarich [L.F. 65]. As argued in his substitute brief, the opinions of Employer's experts that Claimant reached maximum medical improvement in April 2007 are not supported by competent and substantial evidence [Appellant's Substitute Brief, pp. 58-59]. Not only were their opinions based upon incomplete information, they were proven wrong since it is uncontroverted and unimpeached that Claimant's condition improved with additional

treatment. Because the opinions of Employer's experts were not supported by sufficient competent evidence, as a matter of law the Commission could not resolve the issue of causation by choosing the opinions of Employer's experts over those of Dr. Volarich. The Commission was, therefore, left only with the testimony of Dr. Volarich, which it could not reject and substitute its own personal opinions on medical causation. ***Wright v. Sports Associated, Inc.***, 887 S.W.2d 596, 600 (Mo. 1994) (*overruled on other grounds by* ***Hampton***, 121 S.W.3d at 223).

There is nothing in the record to conclude that the Commission found Dr. Volarich testified falsely. The Commission rejected the comments and the rationale of the ALJ for discounting the opinions of Dr. Volarich. The Commission, however, concluded that the opinions of Dr. Volarich did not provide a convincing basis for the award sought by Claimant [L.F. 64]. As in ***Highley***, the Commission's majority did not specifically find that it did not believe Dr. Volarich but instead simply noted its reasons for discounting the opinions of Dr. Volarich on the issue of medical causation for the need for additional treatment after April 2007 and the need for future medical treatment for his feet, upper extremity and spine [L.F. 64-65]. As a result, according to the thinking in ***Highley***, the ***Corp*** rule should apply to the present case.

All deference that accompanies substantial evidence review means nothing if the matter at issue is properly determined to be a question of law and not fact. "Where the evidentiary facts are not disputed, the award that should be entered by the . . . Commission becomes a question of law and the Commission's conclusions are not binding on the

appellate court." ***Corp***, 337 S.W.2d at 258. The Commission could not arbitrarily disregard or ignore the competent, substantial and unrefuted evidence of Dr. Volarich who had not been impeached. Additionally, the Commission could not base its finding on conjecture and its own personal opinions unsupported by sufficient competent evidence. ***Id.***; ***Merriman v. Ben Gutman Truck Service, Inc.***, 392 S.W.2d 292 (Mo. 1965). ***Wright***, 887 S.W.2d at 600; *see also* ***Highley***, 247 S.W.3d at 58; ***Houston***, 133 S.W.3d at 179.

"[T]he Commission cannot find there is no causation if the uncontroverted medical evidence is otherwise." ***Wright***, ***Id.*** Because there was no competent expert medical testimony to refute the testimony of Dr. Volarich, the ultimate conclusion that Claimant reached MMI in April 2007 is based upon conjecture and the personal opinions of the Commission's majority.

Additionally, in his substitute brief, Claimant analyzed the Commission's misapplication of the law, faulty reasoning and lack of sufficient competent evidence to support its reasons for discounting Dr. Volarich's causation opinions. Specifically, for each body part injured in his November 2006 accident, Claimant referenced the records wherein he described his inability to work after being released by Employer's expert and benefits of his additional treatment. Claimant's testimony was also corroborated by the subsequent treatment records and medical opinions of Drs. Volarich and Aubuchon regarding the need for additional treatment for his feet, as provided by Dr. Martin, for his shoulder, as provided by Dr. Rummell, and for his back, as provided by Dr. Graven and others [Appellant's Substitute Brief, pp. 61-70]. In response, Employer simply references the Commission's

rationale for rejecting the opinions of Drs. Volarich and Aubuchon without attempting to defend the majority's crabbed review of the evidence, misguided reasoning and erroneous declaration and application of the law [Respondent's Substitute Brief, p. 9].

In summary, whether the Court follows the rule in ***Wood*** or ***Corp***, the result is the same – the ultimate conclusion of the Commission that Claimant reached MMI in April 2007 is not supported by the record. Furthermore, the Court is faced with one of those "rare cases" where the Commission's decision is contrary to the overwhelming weight of the evidence. See ***Hampton***, 121 S.W.3d at 223. Finally, in reaching its decision to deny Claimant a temporary award, the Commission exceeded its authority in failing to follow the governing burden of proof standards. Accordingly, the Court should reverse the Commission's entry of a final PPD award and remand the case with directions that the Commission enter a temporary award in favor of Claimant.

3. Claimant Met His Burden of Proof on the Issues of Temporary Total Disability and His Entitlement to Attorney's Fees and Costs and, in the Alternative, that the Final Award is not Supported by Sufficient Competent Evidence.

Claimant, in his initial brief, outlined the facts and controlling statutes and case law supporting the conclusion that Claimant remained temporarily totally disabled when he was released by the physicians selected by Employer [Appellant's Brief, pp. 70-72]. Employer does not argue that Claimant was able to work when he was released in April 2007. Additionally, Employer does not argue that if the Court reverses the Commission's decision denying Claimant TTD beyond April 27, 2007 that it would be inappropriate to direct the

Commission to award Claimant his attorney's fees and expenses, as argued in Claimant's substitute brief [Id., pp. 72-73]. Finally, neither Employer nor the Fund[1] responds to Claimant's argument that the final award is not supported by sufficient competent evidence [Id., pp. 73-74]. Presumably, they concede each argument.

II. THE COMMISSION ERRED IN FAILING TO AWARD CLAIMANT PAST DUE MEDICAL EXPENSES, INTEREST AND FUTURE MEDICAL CARE BECAUSE THE COMMISSION MISAPPLIED THE LAW AND THE AWARD IS NOT SUPPORTED BY THE RECORD AND IS CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE, AS REVIEWABLE UNDER §287.495.1, IN THAT:

A. CLAIMANT'S MEDICAL CARE AFTER APRIL 2007 FLOWED FROM HIS COMPENSABLE WORK ACCIDENT, INCLUDING TREATMENT FOR HIS BILATERAL FOOT, SHOULDER AND BACK PAIN, DEPRESSION, ANXIETY AND INSOMNIA;

B. THE UNCONTRADICTED AND UNIMPEACHED EVIDENCE ESTABLISHED THAT THE ADDITIONAL TREATMENT HELPED ALLEVIATE THE EFFECTS OF CLAIMANT'S COMPENSABLE WORK-RELATED INJURIES;

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[1]The Fund waived its right to file a brief, although Claimant's arguments implicate its legal interests.

C. CLAIMANT DEMANDED, AND THE EMPLOYER FAILED OR REFUSED TO PROVIDE ADDITIONAL TREATMENT; AND

D. THE UNCONTRADICTED AND UNIMPEACHED EVIDENCE ESTABLISHED THAT CLAIMANT NEEDED FUTURE MEDICAL TREATMENT TO HELP ALLEVIATE THE EFFECTS OF HIS WORK-RELATED INJURIES.

Employer does not specifically address Claimant's Point II. Even if it is assumed that Claimant reached MMI in April 2007, it does not mean that he was not entitled to recover his past medical expenses, together with interest, and future medical care. ***Martin v. Town and Country Supermarkets***, 220 S.W.3d 836, 844 (Mo.App. S.D. 2007). As argued more fully in his substitute brief, the Commission's decision to deny Claimant past and future medical benefits is not supported by competent and substantial evidence on the record as a whole. Employer failed to follow the directives of Dr. Paletta to schedule Claimant for pain management to better deal with his complaints to his feet, shoulder and low back. Additionally, the Commission's findings ignore the testimony of Dr. Volarich that prior to and following Claimant's back surgery, Claimant was in need of additional medical treatment to maintain his current state of health [Appellant's Substitute Brief, pp. 75-78]. Considering these facts and applying the proper legal standard for awarding medical benefits, the Court should reverse the Commission and direct it to award Claimant his past medical expenses, together with interest, and future medical care.

III. THE COMMISSION ERRED IN LIMITING THE 15% PENALTY AGAINST EMPLOYER FOR VIOLATING THE SCAFFOLDING ACT TO THE AMOUNTS AWARDED BY THE ALJ BECAUSE THE COMMISSION MISAPPLIED THE LAW, AS REVIEWABLE UNDER §287.495.1, IN THAT UNDER §287.120.4, CLAIMANT WAS ENTITLED TO RECOVER THE PENALTY ON ALL AMOUNTS PROVIDED BY EMPLOYER UNDER CHAPTER 287 *ET SEQ.*, INCLUDING TTD AND MEDICAL BENEFITS VOLUNTARILY PROVIDED OR AWARDED CLAIMANT.

Employer does not respond to Point III that the 15% penalty should be assessed against the amounts voluntarily provided by Employer in temporary total disability benefits and medical aid under the Workers' Compensation Act based on the unambiguous language of §287.120.4 RSMo. [Appellant's Substitute Brief, pp. 78-81]. Employer, presumably, concedes the point.

CONCLUSION

On his appeal, Claimant requests this Honorable Court to reverse the final award and remand the claim to the Commission to enter a temporary award with directions to find that: Claimant did not reach maximum medical improvement in April 2007 and remained temporarily totally disabled and in need of medical care to cure or relieve the effects of his work-related injuries; Claimant is entitled to recover the costs of his reasonable and necessary medical expenses incurred to the date of hearing in the sum of $111,853.15, together with interest at 9% per annum; Claimant is entitled to recover his post hearing

medical expenses and future treatment of his feet, back and left shoulder, insomnia, depression and anxiety; Claimant is entitled to past due TTD benefits from 4/27/07, together with interest at 10% per annum, until he reaches maximum medical improvement or is returned to work; to reconsider whether he is Claimant is entitled to recover his reasonable attorney's fees and costs incurred in the prosecution of his §287.203 motion; Claimant is entitled to recover a 15% penalty under §287.120.4 RSMo. on all amounts provided under the Act, whether voluntarily provided or in compliance with the award, and such other and further relief deemed just and proper in the premises.

APPELLANT'S SUBSTITUTE CROSS APPEAL BRIEF

STATEMENT OF FACTS

In his initial brief, Claimant summarized the procedural history and evidence relevant to the Points Relied On in his appeal [Appellant's Substitute Brief, pp. 11-37]. Although permitted under Rule 84.04(f), Employer's brief does not include a statement of facts. Claimant incorporates herein by reference the facts that are relevant to the point relied on by Employer in its cross appeal, as set forth on pages 11, 12 and 14 of his substitute brief.

POINTS RELIED ON

IV. THE COURT SHOULD DISMISS EMPLOYER'S CROSS APPEAL BECAUSE ITS BRIEF FAILS TO COMPLY WITH RULE 84.04 AND PRESERVES NOTHING FOR REVIEW ON APPEAL, IN THAT:

A. EMPLOYER'S POINT RELIED ON FAILS TO CONFORM TO THE REQUIREMENTS OF RULE 84.04(d)(2); AND

B. THE ARGUMENT PORTION OF EMPLOYER'S CROSS APPEAL BRIEF FAILS TO CONFORM TO THE REQUIREMENTS OF RULE 84.04(e) AND (i).

Weisenburger v. City of St. Joseph, 51 S.W.3d 119 (Mo.App. W.D. 2001)

Finnical v. Finnical, 81 S.W.3d 554 (Mo.App. W.D. 2002)

Lombardo v. Lombardo, 120 S.W.3d 232 (Mo.App. W.D. 2003)

Supreme Court Rule 84.04

V. THE COMMISSION DID NOT ERR, AS A MATTER OF LAW, BY INCLUDING THE TOTAL AMOUNTS AWARDED AGAINST EMPLOYER AND THE FUND WHEN COMPUTING THE 15% PENALTY UNDER §287.120.4, IN THAT:

A. THE PENALTY AWARD IS SUFFICIENTLY CLEAR TO BE ENFORCEABLE;

B. IF THE PENALTY WERE REDUCED BY THE AMOUNTS EMPLOYER PAID AS AN ADVANCE ON PPD, IT WOULD FRUSTRATE THE PURPOSE OF §287.120.4; AND

C. THE PENALTY AWARD IS SUPPORTED BY THE UNAMBIGUOUS LANGUAGE OF §287.120.4.

Brown v. Color Coating, Inc., 867 S.W.2d 242 (Mo.App. S.D. 1993)

Pavia v. Smitty's Supermarket, 118 S.W.3d 228 (Mo.App. S.D. 2003)

Spradlin v. City of Fulton, 982 S.W.2d 255 (Mo.banc 1998)

Wolff Shoe Co. v. Director of Revenue, 762 S.W.2d 29 (Mo.banc. 1988)

Mo. Rev. Stat. §287.120 RSMo.

Mo. Rev. Stat. §287.220 RSMo.

ARGUMENT

IV. THE COURT SHOULD DISMISS EMPLOYER'S CROSS APPEAL BECAUSE ITS BRIEF FAILS TO COMPLY WITH RULE 84.04 AND PRESERVES NOTHING FOR REVIEW ON APPEAL, IN THAT:

A. EMPLOYER'S POINT RELIED ON FAILS TO CONFORM TO THE REQUIREMENTS OF RULE 84.04(d)(2); AND

B. THE ARGUMENT PORTION OF EMPLOYER'S CROSS APPEAL BRIEF FAILS TO CONFORM TO THE REQUIREMENTS OF RULE 84.04(e) AND (i).

Compliance with briefing requirements under Rule 84.04 is mandatory. "When faced with a defective brief, an appellate court should not become the [party's] advocate by ferreting out facts, reconstructing points, and deciphering arguments." ***Weisenburger v. City of St. Joseph***, 51 S.W.3d 119, 125 (Mo.App. W.D. 2001). The failure to substantially comply with the requirements of Rule 84.04 preserves nothing for appellate review, requiring dismissal of the appeal. ***Finnical v. Finnical***, 81 S.W.3d 554, 560-61 (Mo.App. W.D. 2002).

A. Employer's Point Relied On is Deficient.

Rule 84.04(d)(2), which governs the requirements of a point relied on, provides:

(2) Where the appellate court reviews the decision of an administrative agency, rather than a trial court, each point shall:

(A) identify the administrative ruling or action the appellant challenges;

(B) state concisely the legal reasons for the appellant's claim of reversible error; and

(C) explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error.

The point shall be in substantially the following form: "The [*name of agency*] erred in [*identify the challenged ruling or action*], because [*state the legal reasons for the claim of reversible error, including the reference to the applicable statute authorizing review*], in that [*explain why, in the context of the case, the legal reasons support the claim of reversible error*]."

Employer's cross appeal brief asserts one point on cross appeal. The Point reads: "The Commission's ruling concerning the amount of the penalty is vague" [Respondent's Substitute Brief, p. 4].

The point does substantially follow the form required under Rule 84.04(d)(2). The point does not reference the applicable statute authorizing review or the legal reason or reasons claimed to be reversible error. The point fails to explain in a summary fashion why, in the context of the case, the legal reasons support the claim for reversible error. As such, the point is nothing more than an abstract statement of law, which fails to satisfy the requirements of a proper point relied on, preserving nothing for appeal. Rule 84.04(d)(4). ***Finnical***, 81 S.W.3d at 559.

B. Employer's Argument is Deficient.

Rule 84.04(e) provides, in part: "The argument shall substantially follow the order of 'Points Relied On' . . . The argument shall be limited to those errors included in the 'Points Relied On.' . . . The argument shall also include a concise statement of the applicable standard of review for each claim of error." Rule 84.04(i) additionally mandates that the argument contain specific page references to the legal file or the transcript. Compliance with Rule 84.04(i) is essential to the effective functioning of appellate courts. "A party's mandated compliance with this Rule allows this court to verify the evidence upon which a party relies in support of its argument; without such compliance, this court would effectively act as an advocate of the non-complying party, which we cannot do. This court cannot . . . spend time perus[ing] the record to determine if the statements are factually supportable." ***Lombardo v. Lombardo***, 120 S.W.3d 232, 247 (Mo.App. W.D. 2003) (quoting, ***McCormack v. Carmen Schell Const. Co.***, 97 S.W.3d 497, 509 (Mo.App. W.D. 2002)).

Employer's argument does not state the applicable standard of review or contain specific page references to the legal file or the transcript. Point II is divided into 2 arguments, "a" and "b." The point relied on asserts that the Commission's award regarding the calculation of the penalty is vague. In the arguments that follow, Employer does not explain how the award is vague. Under Argument IIa, Employer asserts that the penalty should not include the $7,000.00 paid by Employer as an advance on indemnity. Under Argument IIb, the Employer argues that the penalty should not include the amount awarded against the Fund because it should not be punished for injuries that it did not result from its

conduct. Both arguments under Point II violate 84.04(e) since they fail to follow the point relied on and are not limited to the claimed error included in the point. Additionally, argument IIa fails to cite any relevant authority or explain the absence of such to support its argument. Under Rule 84.04, the Court is not required to review a claim on appeal if it appears without citation of applicable or relevant authority. ***Finnical***, 81 S.W.3d at 560. Accordingly, this Court should dismiss Employer's cross appeal.

Moreover, even if the Court is willing to consider Employer's point relied on, *ex gratia*, it lacks merit.

(Response to Employer's Point II)

V. THE COMMISSION DID NOT ERR, AS A MATTER OF LAW, BY INCLUDING THE TOTAL AMOUNTS AWARDED AGAINST EMPLOYER AND THE FUND WHEN COMPUTING THE 15% PENALTY UNDER §287.120.4, IN THAT:

A. THE PENALTY AWARD IS SUFFICIENTLY CLEAR TO BE ENFORCEABLE;

B. IF THE PENALTY WERE REDUCED BY THE AMOUNTS EMPLOYER PAID AS AN ADVANCE ON PPD, IT WOULD FRUSTRATE THE PURPOSE OF §287.120.4; AND

C. THE PENALTY AWARD IS SUPPORTED BY THE UNAMBIGUOUS LANGUAGE OF §287.120.4.

Employer's point relied on purports to raise a question of law. The Court reviews conclusions of law *de novo* and without deference to the Commission's judgment. ***Schoemehl v. Treasurer of State***, 217 S.W.3d 900, 901 (Mo.banc. 2007).

A. The Penalty Award is Not Vague.

A judgment must be sufficiently definite to be susceptible to enforcement in the manner provided by law. "To comply with this requirement, the judgment must adjudicate the controversy to a conclusion which permits issuance and processing of an execution without external proof or another hearing." ***Brown v. Color Coating, Inc.***, 867 S.W.2d 242, 244 (Mo.App. S.D. 1993). The award is not vague or indefinite if it merely requires a ministerial computation of the amount owed. See ***Glassberg v. Obando***, 791 S.W.2d 486, 488 (Mo.App. E.D. 1990). If the sense of the award can be clearly ascertained by reference to the pleadings and the record, it will be upheld. ***In re Marriage of Melton***, 816 S.W.2d 232, 238 (Mo.App. S.D. 1991).

Contrary to Employer's Point II, the penalty award is not vague.[2] The Commission ordered that the amount awarded by the ALJ be increased by 15% [L.F. at 68]. The ALJ awarded Claimant $43,602.61 in PPD benefits, $27,636.89 against Employer and $15,965.72 against the Fund [L.F. at 75]. The amount of the penalty can be calculated, without another

[2]Employer does not develop its point relied on in the argument. Because Employer does not argue that the penalty award is vague and cites no authority for the point, the claim is abandoned on appeal. ***Finnical***, 81 S.W.3d at 339; ***Blankenship v. Division of Employment Sec.***, 327 S.W.3d 579, 581-2 (Mo.App. S.D. 2010).

hearing, by multiplying the total amount of the PPD award ($43,602.61) by 15%.

B. The Penalty Properly Included the Full Amount Awarded Against Employer.

Under Argument IIa, Employer asserts that the penalty should not be imposed against the $7,000.00 which it paid Claimant as an advance on compensation due under the award. As argued in Claimant's substitute brief, the plain language of §287.120.4 requires that the penalty be imposed against all amounts provided under Chapter 287 *et seq*. ("Act"), whether voluntarily provided or in compliance with the award [Appellant's Substitute Brief, pp. 66-68]. Neither the text of the statute, the relevant case law nor logic supports Employer's argument. "The purpose of the penalty is to encourage employers to comply with the laws governing safety." ***Pavia v. Smitty's Supermarket***, 118 S.W.3d 228, 244 (Mo.App. S.D. 2003). To allow Employer to avoid or reduce the penalty by voluntarily providing benefits or making an advanced payment on compensation that may be awarded under the Act would undercut the purpose of §287.120.4 and would result in an absurd and illogical result, defeating the intent of the legislature. *See* ***Spradlin v. City of Fulton***, 982 S.W.2d 255, 258 (Mo.banc 1998).

Employer's stipulated indemnity credit is effective only in reducing the amount owed Claimant. Claimant was awarded $27,636.89 in PPD benefits against Employer. While it is true that the indemnity credit reduces the actual amount owed Claimant to $20,636.89 in PPD benefits, it does not serve to shelter the $7,000.00 from the 15% penalty.

C. The Penalty Properly Included the Amount Awarded Against the Fund.

Under Argument IIb, Employer argues the penalty should not include the amount

awarded Claimant against the Fund. Again, Employer's argument ignores the clear and plain language of §287.120.4.

Employer does not argue that §287.120.4 is ambiguous. Where a statute's language is clear and unambiguous, there is no room for construction. ***Wolff Shoe Co. v. Director of Revenue***, 762 S.W.2d 29, 31 (Mo.banc. 1988). Section 287.120.4 states that the penalty is to be assessed against the compensation provided under the Act. Compensation provided for under the Act includes permanent partial and total disability benefits awarded against the Fund (Section 287.220 RSMo.). Because there is nothing ambiguous about the language of §287.120.4, there is nothing for the Court to interpret. ***Wolff Shoe Co., Id.*** at 31.

There is also nothing in the text of §287.120.4 to suggest that the legislature intended to carve out an exception for compensation awarded against the Fund. Had the legislature intended such an exception, it could have easily expressly limited the scope of the compensation against which to impose the penalty by rewriting the section to read as follows: "Where the injury is caused by the failure of the employer to comply with any statute in this state or any lawful order of the division or the commission, the compensation and death benefits *payable by the employer and insurer* shall be increased fifteen percent." The legislature, however, did not insert such limiting language.

The Court may look beyond the plain meaning of the words of the statute "only when the language is ambiguous or would lead to an absurd or illogical result." ***Akins v. Director of Revenue***, 303 S.W.3d 563, 565 (Mo.banc. 2010). Section 287.120.4 is one sentence, divided into two parts. The first part states the conditions for imposing a penalty (a violation

of a safety statute by the employer, which caused the claimant's injury). The second part states how the penalty is to be calculated (against amounts provided under the Act). The section makes clear that the legislature did not intend to limit the penalty to the compensation provided by the employer.

This interpretation is neither absurd nor illogical and does it undercut the purpose of the penalty section "to punish the wrongdoer and deter others." ***Spradlin***, 982 S.W.2d at 261; *see also* ***Pavia***, 118 S.W.2d at 244. Indeed, excluding the amount awarded against the Fund in calculating the penalty would reward Employer and other similarly situated employers – resulting in an abused interpretation of the penalty section. The award fixes the Fund's liability separate and apart from Employer's liability, as required under §287.220 [L.F. 75]. Including the amount awarded against the Fund in calculating the amount of the penalty does not effect the Fund's liability or its solvency. Moreover, it does not shift the Fund's liability to the employer, as suggested by Employer [Respondent's Substitute Brief, pp. 16-17]. Rather, including the award owed by the Fund is simply a part of the formula for calculating the amount of the penalty.

Including the amount awarded against the Fund when calculating the penalty under §287.120.4 is also consistent with strict statutory construction required by§287.800.1. "Strict construction means that a 'statute can be given no broader application than is warranted by its plain and unambiguous terms.'" ***Robinson v. Hooker***, 323 S.W.3d 418, 423 (Mo.App. W.D. 2010) (citations omitted). A strict construction of a statute presumes nothing that is not expressed. ***Id***. Under the cannon of strict construction, §287.120.4 "must be confined

to matters affirmatively pointed out by its terms." ***Id***. The Court is not authorized to give the section any broader application than is warranted by the plain and unambiguous terms of the penalty section. ***Spradlin***, 982 S.W.2d at 261. "There is no room for construction even when a court may prefer a policy different from that enunciated by the legislature." ***Id.*** (quoting, ***Kearney Special Road Dist. v. County of Clay***, 863 S.W.2d 841, 842 (Mo.banc. 1993)). Thus, strict construction of §287.120.4 supports the conclusion that the compensation awarded against the Fund, as provided under the Act, falls within the meaning of the word "compensation" for the purpose of calculating the amount of the penalty against an employer.

The issue in this case is not "how broadly the law should be applied, only the harshness of the penalty." ***Spradlin***, 982 S.W.2d at 262.[3] Although there may be reasons to exclude the amount owed by the Fund in calculating the amount of the penalty, as argued by Employer, the Court does "not have the authority to read into a statute a legislative intent that is contrary to its plain and ordinary meaning." ***State v. Rowe***, 63 S.W.3d 647, 650 (Mo. 2002). The harshness of the penalty is a question of public policy that must be addressed to legislature. ***Spradlin***, 982 S.W.2d at 261, citing, ***Bethel v. Sunlight Janitor Service***, 551 S.W.2d 616, 620 (Mo.banc 1977). "It is the function of the courts to construe and apply the law and not to make it." ***State v. Meggs***, 950 S.W.2d 608, 610 (Mo.App. S.D. 1997) (*rev. on other grounds* by ***State v. Severe***, 307 S.W.3d 640 (Mo. 2010)). "[T]his Court, under the

[3]Employer does not attack the constitutionality of §287.120.4 or otherwise argue that the legislature abused its discretion or acted arbitrarily or capriciously by including the amount awarded against the Fund in calculating the penalty.

guise of discerning legislative intent, cannot rewrite the statute." ***State v. Rowe***, 63 S.W.3d at 650. Whether the penalty should exclude the amount owed by the Fund should be left to the legislature to change. ***Id.***

CONCLUSION

On Employer's cross appeal, Claimant requests this Honorable Court to dismiss Employer's appeal and affirm the Commissions award of the fifteen percent (15%) penalty, as modified, in accordance with Claimant's Point Relied On III [Appellant's Substitute Brief, pp. 78-81].

Respectfully submitted,

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APPELLANT'S CERTIFICATIONS

1. The undersigned hereby certifies that on the 27th day of February, 2012, a copy of the foregoing Substitute Reply and Cross Appeal Brief was electronically filed with the Clerk of the Court to be served by operation of the court's electronic filing system upon all attorneys of record.

2. This brief complies with the limitations contained in Rule 84.06(b) and it is within the word limitation set forth therein.

3. There are 6,915 words in this brief, prepared in proportional space type.

4. This brief was prepared by WordPerfect X5 computer software and has been scanned for viruses and is virus free.

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